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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 489

ARNOLD VAN DEN WYMELENBERG, AS EXECUTOR OF THE ESTATE OF ELEANOR VAN DEN WYMELENBERG,

Plaintiff-Petitioner,

AND

ARNOLD VAN DEN WYMELENBERG,

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of said Court of Appeals entered in the above entitled cases on June 19, 1968.

OPINIONS BELOW.

The original decision, written by the Honorable Myron Gordon, Judge of the United States District Court for the Eastern District of Wisconsin is reported in 272 Fed. Supp. 571. The opinion of the District Judge also appears at page 14 of the plaintiffs' Appendix in the Court of Appeals, certified and filed in this Court as a part of the transcript of the record. References to such Appendix will hereinafter be referred to as (App. ....).

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court is reported in ..... Fed. 2nd. ....., and is also set forth in the Appendix to this Petition.

JURISDICTION.

The date of the judgment sought to be reviewed is June 19, 1968; the date of entry is the same.

This is a suit for refund of Gift Taxes paid by plaintiffs-petitioners, and the jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254 (1) and Section 2101(c).

Grounds for invoking the jurisdiction of this Court are that the decision of the Court of Appeals in this case is in conflict with decisions of the United States Courts of Appeal in the Fourth and Ninth Circuits.

QUESTIONS FOR REVIEW.

1. Where, through mistake of scrivener, Trust Agreement executed by Plaintiff-Donors failed to contain certain provisions which Plaintiffs had directed to be included in it, and Plaintiffs signed the instrument in belief that it contained such provisions, and, upon discovery of mistake,

executed a "Corrected Trust Agreement," which conformed in its terms to their actual intent at time of execution of first instrument, should Plaintiffs' liability for gift taxes on gifts to minor grandchildren be determined under the provisions of the "Corrected Trust Agreement" or under the provisions of the initial agreement executed by Plaintiffs under a mistake of fact as to the contents of the instrument?

2. Were gifts in trust of net income from rental real estate which Trustee was required to distribute annually to Plaintiffs' minor grandchildren until they reached the age of twenty-one years gifts of present interests the value of which was reasonably determinable so as to entitle Plaintiffs to apply Gift Tax Exclusions to the value of such interests?

STATUTES AND REGULATIONS INVOLVED.

SEC. 2503, *Taxable Gifts.*

(b) Exclusions From Gifts.—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1955 and subsequent calendar years, the first $3,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power shall be disregarded in applying this subsection, if no part of such interest will at any time pass to any other person.

(c) Transfer for the Benefit of Minor.—No part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property for purposes of subsection (b) if the property and the income therefrom—

(1) may be expended by, or for the benefit of,

the donee before his attaining the age of 21 years, and

(2) will to the extent not so expended—

(A) pass to the donee on his attaining the age of 21 years, and

(B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514 (c).

Reg. 25.2512-5 (TD 6334, filed 11-14-58) Valuation of annuities, life estates, terms for years, remainders and reversions—

(a) In general. (1) The fair market value of annuities, life estates, terms for years, remainders and reversions is their present value, determined under this section, ****.

(c) Life estates and terms for years. **** If the interest to be valued is the right to receive income of property or to use nonincome-producing property for a term of years, column 3 of Table II is used.

STATEMENT OF MATERIAL FACTS.

These actions were brought to recover gift taxes which Appellants claim were erroneously assessed and collected with respect to gifts in trust to their twelve (12) minor grandchildren.

The material facts which we here set forth were either stipulated (See Stipulations of Fact at App. 4 and App. 13), or were established without dispute by the depositions of John H. Evans, Arnold, Eleanor, and John Van Den Wymelenberg, hereinafter "Van"), received in evidence at the trial.

These material facts are as follows:

Several months before July 6, 1961, the date of execution of the trust agreement initially executed by the Plaintiffs

(App. 6), the Plaintiffs had consulted their accountant, John H. Evans, and their legal counsel, E. L. Everson, with respect to the desirability of making a gift in trust to their twelve (12) minor grandchildren of a piece of real estate which Plaintiff Arnold Van was then negotiating to purchase. In their initial conferences with the accountant and legal counsel, Plaintiffs' thoughts ran toward the idea that the property should be kept in trust for a period of years, fifteen (15) or twenty (20), which would mean as to most of the grandchildren the corpus would not vest until they were past twenty-one (21) years of age; also, their initial thoughts were that the income ought not to be distributed annually, but should be permitted to accumulate until the vesting of the corpus; also, that in the event of the death of a beneficiary before vesting, its share in the corpus and income would go to its siblings and also that the trustee would have no power to invade the corpus at any time or for any purpose.

A tentative draft of a trust instrument incorporating these initial ideas was prepared as a basis for further discussions between the Plaintiffs, their son, John Van, who acted as their financial advisor, and their accountant and legal counsel.

In these subsequent discussions it was pointed out to the Plaintiffs by their advisors that in order to qualify the trust for annual gift tax exclusions, these initial ideas would have to be modified. They were specifically advised that in order to comply with the provisions of Section 2503 (c) of the 1954 Internal Revenue Code the trust agreement would have to provide, (1), for vesting of the corpus at age 21, (2) for actual distribution at least annually of the net income, (3) for at least a discretionary power in the trustee to invade the corpus for the reasonable needs of the beneficiaries; and, (4) for the right in the beneficiaries to dispose of their interests by will.

It was of major importance to the Plaintiffs that the Federal Gift Taxes on these contemplated gifts should be avoided. Therefore, after they had considered the advice of their accountant and legal counsel, they decided to change their original ideas in all four of these respects.

In the meantime, the negotiations for purchase of the real property were going on, and by June 29, 1961 had progressed to the point where Plaintiff Arnold Van had reached an agreement to purchase, and had made a down-payment on the purchase price.

On that same date a meeting took place between Plaintiff Arnold Van, his son, John, the accountant, John H. Evans, and Plaintiffs' legal counsel, E. L. Everson, at which Plaintiff Arnold Van specifically directed Attorney Everson to make such changes in the initial draft of the trust agreement as would be necessary to conform the final draft to the four requirements of Section 2503 (c) which had been the subjects of their previous discussions.

On July 6, 1961, Arnold Van acquired title to the real property for a cash consideration of $50,000 subject to a mortgage of $82,500 which he assumed and agreed to pay. Immediately thereafter, on that same day, he executed the Trust Agreement (App. 6), believing that it then contained the revisions which had been agreed upon at the conference of June 29, 1961. At the same time he deeded the real property to the trustee, Ruth Merkey, his daughter. His wife, Eleanor, joined in the gift for the purpose of doubling the gift tax exclusion. She also executed the trust agreement as a donor, then believing as he did that it contained the provisions necessary to qualify the gift for annual exclusion as required by Section 2503 (c). Neither Plaintiff fully read the Trust Agreement before they signed it, but relied on the belief that Counsel had made the necessary revisions in the preliminary draft, as he had been instructed to do at the conference a week before.

On April 14, 1962, Plaintiffs duly filed Gift Tax Returns listing gifts in trust to the twelve grandchildren under the Trust Agreement of July 6, 1961, in the aggregate value of $50,000, in equal shares of $4,166.67 to each grandchild. In these returns each spouse consented that their gifts be treated as having been made one-half by each, thus making a $6,000 annual exclusion available for each gift which qualified for an annual exclusion. This exclusion was claimed for each of the gifts to the grandchildren, so that the returns showed that no tax was payable. The District Director of Internal Revenue, Milwaukee, with whom the returns were filed was provided with a copy of the Trust Agreement.

On or about September 10, 1963, the Plaintiffs were notified by the Director that he proposed to disallow the exclusions for the reason that the gifts were future interests which did not qualify for exclusion under Section 2503 (c). It was then discovered for the first time that in preparing the revised draft which was executed on July 6, 1961, a mistake had been made in the office of Plaintiffs' legal counsel in revising paragraphs four and five of the initial working draft, and that as a result of this mistake the executed instrument failed to include the changes previously agreed upon with respect to invasion of corpus and a beneficiary's right to dispose of his interest by will.

Upon discovery of the mistake a "Corrected Trust Agreement" incorporating the intended revisions to paragraphs four and five was immediately prepared an executed, *nunc pro tunc* as of July 6, 1961, by the signatories to the original instrument. A copy of the "Corrected Trust Agreement" with a statement that the original had been executed through a mistake of fact as to certain of its provisions was filed with the Director on September 25,

1963, as part of a written protest against the proposed deficiency assessments.

The Director disallowed the protests, and on July 31, 1964 assessed deficiencies of $4,968.51 against Arnold Van and $4,653.51 against Eleanor Van. These assessments with interest, totaling $5,652.33, and $5,293.97, respectively, were paid on August 10, 1964.

Claims for refund were filed on September 22, 1964, and on March 2, 1965 Plaintiffs were notified that the claims had been disallowed.

It has been stipulated that the actual net income from the trust during the first four years of its operation totaled $11,659.72; or an average of $242.00 per year distributed annually to each beneficiary.

United States District Court had jurisdiction of the cases under the provisions of 28 U. S. Code Section 1346 (a), (1).

REASONS FOR GRANTING THE WRIT.

I. With respect to the first question (*supra*) which this Court is asked to review, there is an essential conflict between the decision of the Court of Appeals for the Seventh Circuit in these cases and the decision of the Court of Appeals for the Ninth Circuit in the case of *Flitcroft* v. *Commissioner*, 382 Fed. 2nd 499 (1964).

In the present case the Seventh Circuit has held that a trust agreement executed under a mistake of fact as to the provisions it contained cannot thereafter be reformed in any manner or by any means so as to affect the Federal tax consequences which would result from execution in its original form.

In the *Flitcroft* case the Ninth Circuit has held that a trust agreement from which an intended provision was inadvertently omitted may be reformed with such effect

as to eliminate liability for Federal taxes otherwise assessable under the terms of the initial agreement.

We respectfully submit that this question warrants consideration by this Court in order that the essential conflict between these decisions may be finally resolved.

II. With respect to the second question (*supra*), which this Court is asked to review, there is an essential conflict between the decision of the Court of Appeals for the Seventh Circuit in these cases and the decision of the Court of Appeals for the Fourth Circuit in the case of *Rosen* v. *Commissioner*, ___ Fed. 2nd page ____ (1968), which, incidentally was handed down on June 14, 1968, just five days before the decision in the present case.

In the present case, the Seventh Circuit has held that the taxpayers were not entitled to allowance of annual exclusions with respect to the present value of the income interests given to their grandchildren because the broad powers conferred upon the trustee made speculative the extent to which income might be produced in the future; hence, the present value of the income right could not be ascertained; and since the present value could not be determined, no exclusion could be allowed.

In the *Rosen* case the Fourth Circuit has held that even where the nature of the corpus was such that at the time of the gift it was presently producing no income at all, with no reason to expect that it would do so in the future, that the taxpayers were entitled to allowance of the annual exclusions. The Fourth Circuit held that in such situations, where no better standard was available, the present value was to be determined by resort to the actuarial tables in Gift Tax Regulation, Section 25.2512.

The conflict in these decisions presents a question of major importance with respect to the availability of annual exclusions for all gifts in trust of present interests in

future income. It may also affect both for gift tax and estate tax purposes, the allowance of charitable deductions for gifts or bequests of present interests in future income and of charitable remainders.

We submit that the uncertainty resulting from these clearly contradictory decisions is a matter of great concern both to Government and to taxpayer, and that it calls imperatively for early resolution by this Court.

CONCLUSION.

In view of the foregoing it is respectfully requested that a Writ of Certiorari issued to the United States Circuit Court of Appeals for the Seventh Circuit to review its decision entered June 19, 1968, affirming the judgment in these cases of the United States District Court for the Eastern District of Wisconsin.

Respectfully submitted,

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Dated: August 29, 1968.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

September Term, 1967—April Session, 1968.

Nos. 16611, 16612

ARNOLD VAN DEN WYMELENBERG, as Executor of the Estate of Eleanor Van Den Wymelenberg, *Plaintiff-Appellant*,

and

ARNOLD VAN DEN WYMELENBERG, *Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellee*.

Appeals from the United States District Court for the Eastern District of Wisconsin.

June 19, 1968.

Before HASTINGS, *Circuit Judge*, KNOCH, *Senior Circuit Judge*, and SWYGERT, *Circuit Judge*.

HASTINGS, *Circuit Judge*. Appellant, for himself and as executor of the estate of his deceased wife, appeals from adverse judgments entered October 6, 1967 in the district court on their actions for refunds of federal gift taxes.[1]

1. For convenience appellant in both his capacities and his deceased wife will be referred to as taxpayers.

The facts, most of which were stipulated, are undisputed. On July 6, 1961 taxpayers executed a trust agreement creating a trust for their twelve minor grandchildren. The trust *res* was a parcel of real estate valued at $132,500 and subject to a $82,500 mortgage. The grandchildren received equal shares. By the terms of the agreement the corpus was to vest as each beneficiary reached twenty-one years of age, and income was to be distributed at least annually to the beneficiaries. The trustee was given broad powers to deal with the trust property.

Taxpayers presented evidence that some months prior to the excution of the trust agreement they met with their accountant, their lawyer and a son who acted as their financial advisor to discuss creation of the trust. A tentative draft agreement was prepared incorporating taxpayers' initial ideas. Taxpayers were informed by their advisors, however, that modifications would be necessary if the gifts in trust were to qualify for the annual gift tax exclusion pursuant to Title 26 U. S. C. A. § 2503(c).[2] Taxpayers agreed and instructed their attorney to conform the draft agreement to § 2503(c). Through inadvertence the draft agreement signed July 6, 1961 did not empower the trustee to invade corpus to meet the needs of the beneficiaries and did not allow the beneficiaries to

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2. "No part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property for purposes of subsection (b) if the property and the income therefrom—

(1) may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and

(2) will to the extent not so expended—

(A) pass to the donee on his attaining the age of 21 years, and

(B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514(c)."

dispose of their interests by will. The gifts therefore did not qualify under § 2503(c).

The trial court made no findings on the issue of mistake.

In gift tax returns filed April 14, 1962, taxpayers reported each of the twelve gifts as split gifts,[3] both taxpayers claiming an exclusion as to each gift. Since the total exclusion exceeded the $50,000 aggregate value of the gifts, no taxable gifts were reported.

On September 10, 1963, taxpayers were notified by the District Director of Internal Revenue that the exclusions were to be disallowed because the gifts did not qualify under § 2503(c). Shortly thereafter taxpayers executed a Corrected Trust Agreement which purports to bring the July 6, 1961 agreement into conformity with § 2503(c). The corrected agreement was executed "as of July 6, 1961."

On July 31, 1964 deficiencies of $4,968.51 and $4,653.51 were assessed against taxpayers. These assessments were paid with interest on August 10, 1964 and timely claims for refund were filed. The claims were disallowed and these actions were brought to recover the taxes paid.

The principal issue raised is whether the amended trust agreement executed by taxpayers in 1963 retroactively determines the federal gift tax consequences of the 1961 gift in trust. Even assuming that the amended agreement

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3. Pursuant to 26 U. S. C. A. § 2513(a)(1): "A gift made by one spouse to any person other than his spouse shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States. This paragraph shall not apply with respect to a gift by a spouse of an interest in property if he creates in his spouse a general power of appointment, as defined in section 2514(c), over such interest. For purposes of this section, an individual shall be considered as the spouse of another individual only if he is married to such individual at the time of the gift and does not remarry during the remainder of the calendar year."

expressed taxpayers' intent at the time they executed the original agreement and that the discrepancy in that original agreement was caused by inadvertence, we hold the tax consequences must be determined by the original agreement.

Taxpayers cite several Wisconsin state cases for the proposition that a written instrument which, through mistake, does not embody the intent of the parties may be reformed by the parties through voluntary execution of a corrected instrument. However, not even judicial reformation can operate to change the federal tax consequences of a completed transaction. *Straight's Trust* v. *Commissioner*, 8 Cir., 245 F. 2d 327 (1957); *Van Vlaaderen* v. *Commissioner*, 3 Cir., 175 F. 2d 389 (1949); *Daine* v. *Commissioner*, 2 Cir., 168 F. 2d 449 (1948); *Sinopoulo* v. *Jones*, 10 Cir., 154 F. 2d 648 (1946); *cf. Commissioner* v. *Estate of Bosch*, 2 Cir., 363 F. 2d 1009, 1015 (1966) (dissenting opinion), rev'd., 387 U. S. 456 (1967); *Emerson Institute* v. *United States*, D. C. Cir., 356 F. 2d 824, cert. denied, 385 U. S. 822 (1966). Contra, *Flitcroft* v. *Commissioner*, 9 Cir., 328 F. 2d 449 (1964).

As to the parties to the reformed instrument the reformation relates back to the date of the original instrument, but it does not affect the rights acquired by non-parties, including the Government. Were the law otherwise there would exist considerable opportunity for "collusive" state court actions having the sole purpose of reducing federal tax liabilities. Furthermore, federal tax liabilities would remain unsettled for years after their assessment if state courts and private persons were empowered to retroactively affect the tax consequences of completed transactions and completed tax years.

Taxpayers argue the distinction between mistake of fact, which they allege occurred here, and mistake of law,

which they contend was involved in the cases cited in the Government's brief. The mistake of fact-mistake of law dichotomy, developed in equity, is based on principles which have no application in determining the tax consequences of transactions subsequently reformed.

The second issue raised by taxpayers is whether the gifts of income interests in the trust property are subject to the annual exclusion. The original trust agreement provided that the net income of the trust property be distributed to the beneficiaries annually or at shorter intervals. The Government concedes, as it must, that these were gifts of present interests. It contends, however, that they are not subject to the exclusion because their value was not ascertainable at the time the trust was created. The district court agreed.

To qualify for the annual exclusion the value of a gift of a present interest must be ascertainable at the time the gift is made. *Commissioner* v. *Disston*, 325 U. S. 442 (1945).

The trust agreement confers broad powers on the trustee to deal with the trust property. Among these are: the power to sell, exchange or alter the trust assets, the power to allocate receipts to principal or income, and the power to apportion expenditures to principal or income. A similar trust agreement was held not to permit ascertainment of the value of an income interest in *Fischer* v. *Commissioner*, 3 Cir., 288 F. 2d 574 (1961).

The trustee's exercise of the broad powers conferred on her could significantly affect the income from the trust. As the district court noted, she could exchange the trust property for high or low income yielding assets. She could reduce the net income by allocating receipts to principal and/or apportioning expenditures to income.

Taxpayers urge that in deciding whether the value of

the income interests is ascertainable we must consider the reasonable probability that the trustee will use her powers so as to vary the net income from the trust property. However, where the trustee's powers are as broad as those here and where the trust instrument provides no ascertainable standard for the exercise of those powers the trustee's future conduct is in the realm of speculation, not reasonable probability. *Cf. Fischer* v. *Commissioner, supra.*

Taxpayers also urge the court to consider the actual experience of the trust. This, they contend, is the best evidence available of the value of the income interests and shows the consistency of the amounts of income yielded and distributed each year.

However valuable actual experience might be in determining the value of an income interest, qualification for exclusion is determined as of the time the gift is made. If the value is not ascertainable then, subsequent experience cannot render it so in retrospect.

In sum, we are of the view that the district court correctly held that taxpayers' amended trust agreement could not have retroactive effect so as to defeat federal gift taxes that attached prior to amendment. And, further, that the district court correctly determined that the value of the interest in the income from the trust was not ascertainable at the time the trust was created, and that taxpayers therefore were not entitled to an exclusion from taxable gifts.

The judgments appealed from are affirmed.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 489

ARNOLD VAN DEN WYMELENBERG, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a gift tax case arising from the transfer on July 6, 1961, of a parcel of real estate in trust for 12 minor children (R. 14–15).[1] The first issue is whether the settlor's 1963 amendments to the instrument could be given retroactive effect to meet the standards that Section 2503(c) of the Internal Revenue Code of 1954 establishes as requisites to the $3,000 per donee gift tax exclusion allowed by Section 2503(b). The second issue is whether the courts properly ruled that the income interests in the trust could not be valued with sufficient precision to allow, in the alternative, exclusions based

[1] "R." refers to the appendix to petitioner's brief in the court of appeals.

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on the 1961 value of the donees' income rights during minority.

Under the trust agreement, the corpus would neither pass to the estate nor be subject to a testamentary power of appointment of any beneficiary who died during minority. Therefore, under Section 2503(c) of the 1954 Code, the gifts of the corpus failed as a gift of a "present interest" that would be entitled to the exclusions.[2] In September 1963, the settlors attempted to amend the 1961 instrument *nunc pro tunc* so as to introduce provisions which would bring it into compliance with the requirements of Section 2503(c) (R. 15).

The Commissioner assessed deficiencies because of his view that the 1961 instrument failed as a gift of a present interest, and the 1963 amendments could not be relied on to change the tax consequences. He also rejected the alternative claim to exclusions premised on the income rights, basing his action on the ground that the trustees' powers to reinvest the corpus and to allocate expenses and distributive shares of the income between corpus and beneficiaries meant that the value of the income interests could not be ascertained. The trustee was given, for example, power (R. 9), limited only by his "good faith", "[t]o determine whether any money or other property coming into the hands of the Trustee is part of the principal of the trust fund or income therefrom, and to apportion be-

[2] The trust corpus did qualify for the lifetime exemption of $30,000 provided by Section 2521 of the Code, to the extent the donor had not consumed it by prior gifts.

tween principal and income, any loss of [sic] expenditures which, in Trustee's Opinion, should be apportioned". Thus, the trustee could, as he did here, exercise complete discretion in deciding the extent to which the rentals would be used to amortize the mortgage rather than produce current income for the beneficiaries.[2]

In the resulting suit for refund, the district court rejected the contention that the 1963 amendments retroactively cured the defect in the gift of the corpus. It also sustained the Commissioner's position that the value of the income interest was too indefinite to qualify for the exclusions. The court of appeals affirmed (R. 16–20; Pet. App. 11–16).

The decision below is correct. There is no conflict in decisions of the courts of appeals appropriate for resolution here, and there is no other ground for certiorari.

1. There is no dispute about the fact that the trust, as originally drafted and executed, failed to qualify as a gift of present interests in the corpus, and that the September 1963 amendments were essential to the claim of the tax benefit. The situation as it existed in 1961, however, must be the dispositive measure of the tax consequences, for the case falls within the familiar principle that taxes cannot be assessed on the basis of mere intentions to dispose of property.

[2] The record shows that in the first fiscal year of the trust's existence the trustees negotiated a new mortgage on the real estate that constituted the sole asset of the trust and applied $5,700 to payment of principal and interest. Of $10,000 gross rentals in that year, only $2,286.53 remained for distribution to the income beneficiaries (R. 4–5, 13).

E.g., United States v. *Culbertson*, 337 U.S. 733, 740; see, also, *Commissioner* v. *Gordon*, 391 U.S. 83, 96.

For example, several circuits have held that even a judicially directed *nunc pro tunc* reformation of a trust cannot have retroactive tax consequences, where a material change in the original trust terms is required to achieve the desired tax result. See, *e.g.*, *M. T. Straight's Trust* v. *Commissioner*, 245 F. 2d 327 (C.A. 8); *Sinopoulo* v. *Jones*, 154 F. 2d 648 (C.A. 10); see, also, *Van Vlaanderen* v. *Commissioner*, 175 F. 2d 389 (C.A. 3); *Daine* v. *Commissioner*, 168 F. 2d 449 (C.A. 2). The instant case, where there was only an amendment by the voluntary act of the settlors, is an *a fortiori* situation for the application of this rule.

We disagree with petitioner's assertion (Pet. 8) that the decision below conflicts with *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (C.A. 9). In that case trusts which the taxpayers had established for their children failed to state expressly whether the grants were irrevocable. Thereafter it was brought to the attention of counsel that California law presumed revocability. A California *nisi prius* court was asked to, and did, reform the instrument (328 F. 2d at 452) "'in accordance with the express intent of the trustors and trustee'" by expressly providing that the trusts "'were irrevocable from the date of their execution'". Finding that the State proceeding was non-collusive, the Ninth Circuit gave conclusive effect to the State court's decision (*id.* at 459).

It is clear, however, that the Ninth Circuit would not adopt a similar analysis in the present case, for

the absence of a court decree of reformation constitutes an essential distinction. Indeed, it was on this ground that the Ninth Circuit in *Flitcroft* distinguished its earlier decision in *Gaylord* v. *Commissioner*, 153 F. 2d 408, which had refused to allow a retroactive amendment by the settlors to determine the tax consequences. See 328 F. 2d at 457.

Perhaps *Flitcroft* conflicts with *M. T. Straight's Trust, supra*, and the other cases cited above and by the Seventh Circuit in this case. Even that is not clear, since those cases, unlike *Flitcroft*, involved retroactive reformations that added provisions which were contrary to or at least could not have been read into the explicit terms of the original instrument. But even if there is such a conflict, the absence of a court ordered reformation would make the present case an improper vehicle for resolving it. Moreover, any such conflict would no longer be of consequence, in view of this Court's intervening decision in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 457, that federal authorities are not bound by a characterization of property interests rendered by a State trial court, a circumstance which means that the Ninth Circuit could not today follow *Flitcroft* in a case involving a judicially directed reformation.

2. The courts below correctly decided that the value of the income interest in the trust could not be determined with sufficient precision to allow the settlors to claim exclusions based on the 1961 value of the income right given each minor. To qualify for the gift tax exclusion a gift must be both a gift of a present

interest[4] and have a value that may be ascertained at the time of the gift. The powers given here allowed the trustee to vary in any manner the amount of income received by the beneficiaries in any year; indeed nothing in the instrument compelled the payment of any income to the beneficiaries. Numerous decisions recognize that, in such circumstances, the value of the income interest is too uncertain to qualify for the exclusion.[5]

This result does not conflict (see Pet. 9–10) with *Rosen* v. *Commissioner*, 397 F. 2d 245 (C.A. 4). The decision in *Rosen* did not hinge on the powers of the trustees, but focused on the nature of the corpus, which consisted of shares of a family controlled corporation which had never paid a dividend, and which might never do so. The Tax Court held that the present value of the income interest could not be valued. On appeal the Fourt Circuit reversed, and held that the actuarial tables of Treasury Regulations, Sec. 25.2512-5(f), should be used to fix the value because the stock could be traded.

In our view the result in *Rosen* is wrong, because the record there plainly showed that the stock in question was unlikely to pay dividends or be sold. Nevertheless, the decision goes only to the question whether the value of an income interest in a particular type of security may be the subject of a present esti-

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[4] See, *e.g.*, *Commissioner* v. *Disston*, 325 U.S. 442; *Fondren* v. *Commissioner*, 324 U.S. 18; *United States* v. *Pelzer*, 312 U.S. 399.

[5] See, *e.g.*, *Fischer* v. *Commissioner*, 288 F. 2d 574, 577 (C.A. 3); *Funkhouser's Trusts* v. *Commissioner*, 275 F. 2d 245, 247 (C.A. 4); *Commissioner* v. *Brandegee*, 123 F. 2d 58, 61 (C.A. 1).

mate. Here it is clear that the original trust assets would generate income. As *Rosen* expressly recognizes, 397 F. 2d at 247–248, there is an entirely distinct problem where, as here, trustees have extensive powers to allocate that income.* The tables used in *Rosen* could not provide a fair prediction of the way in which the trustee would exercise the discretion he has here; those tables at best may be used where all income must be paid to the beneficiaries and the problem is to make an estimate of the income that the corpus will produce. Cf. *Weller* v. *Commissioner*, 38 T.C. 790.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* Although the trustee here, like those in *Rosen*, had broad powers to reinvest, the income interests in the present trusts failed to have an ascertainable value simply by reason of the trustee's power of allocation. The government did not contend in *Rosen*, as it does here, that the power to reinvest also placed the gift beyond valuation.

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